

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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DEC 21 2005

Federal Communications Commission  
Office of Secretary

In the Matter of

Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 05-292
FM Broadcast Stations	)	RM-11281
(Churchville and Keswick, Virginia and	)	
Marlinton, West Virginia)	)	

To: Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary

**REPLY COMMENTS OF FORCE 5 COMMUNICATIONS, LLC**

Force 5 Communications, LLC ("Force 5"), licensee of WBOP(FM), Churchville, Virginia, pursuant to Sections 1.401 and 1.420(i) of the Commission's Rules and by its counsel, hereby submits these Reply Comments in the above-referenced proceeding.<sup>1</sup> The Commission should grant the proposed changes to the FM Table of Allotments stated in the NPRM and deny the comments filed by Mr. Al Saufley, who opposes the proposed change in community of license of WBOP(FM) from Churchville to Keswick, Virginia.<sup>2</sup> The NPRM proposes changes to the FM Table of Allotments which represents a preferential arrangement of allotments that will provide a first local service to two communities as well as first, second, third and fourth aural services to underserved areas. Mr. Saufley does not challenge that the NPRM proposes a preferential arrangement of allotments; but is concerned that the change in community of license for WBOP(FM) means that the format broadcast on the station will no longer be heard in Churchville. Because the NPRM proposes changes to the FM Table of Allotments that better

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<sup>1</sup> See *In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Churchville and Keswick, Virginia and Marlinton, West Virginia)*, MB Docket No. 05-292 (RM-11281) (rel. October 12, 2005) (Assistant Chief, Audio Division) ("NPRM"). The NPRM authorizes the filing of Reply Comments by December 23, 2005. Thus, these Reply Comments are timely filed.

<sup>2</sup> A copy of Mr. Saufley's comments are attached as Exhibit 1 to this pleading.

serve the public interest, the Commission should deny Mr. Saufley's comments and grant the NPRM. In support thereof, the following is respectfully submitted:

### **Introduction**

On May 11, 20005, Force 5 filed a petition for rule making with the Commission proposing the following changes to the FM Table of Allotments: (1) allocate Channel 292A to Marlinton, West Virginia as that community's first local service; and (2) reallocate Channel 292B1 from Churchville, Virginia to Keswick, Virginia as that community's first local service, substitute Channel 291A at Keswick, and modify the community of license for WBOP(FM) to operate on Channel 291A at Keswick. The proposal will result in a preferential arrangement of allotments consistent with the Commission's FM Allot Priorities<sup>3</sup> by providing a first local service to the communities of Marlinton, West Virginia and Keswick, Virginia as well as the provision of first, second, third and fourth aural services while not depriving Churchville of a first local service, whereas retention of the present allotments would deprive the communities of Marlinton and Keswick of first local service as well as the public of first and second aural services.

The Commission agreed that the Force 5 rule making petition served the public interest, and on October 17, 2005 the Commission released the NPRM, recommending adoption of the proposals contained in the Force 5 rule making petition. The NPRM invited the public to file comments by December 8, 2005. Force 5 timely filed comments reaffirming its interest in the vacant allotment at Marlinton and the proposed change in community of license for WBOP(FM) to Keswick. No parties filed counterproposals or comments challenging that the proposed

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<sup>3</sup> The FM allotment priorities are: (1) First fulltime aura service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 99 FCC 2d 88 (the "FM Priorities").

changes to the FM Table of Allotments specified in the NPRM would better serve the public interest consistent with the *FM Priorities*.

Mr. Al Saufley filed comments in this proceeding. Mr. Saufley does not challenge that the proposed changes to the FM Table of Allotments represents a preferential arrangement of allotments under the *FM Priorities* and therefore serves the public interest. Instead, Mr. Saufley objects to the proposed change in community of license for WBOP(FM) from Churchville to Keswick, Virginia, arguing that the proposed change will deprive listeners in Churchville of a particular music format. For the reasons discussed below, the Commission should grant the NPRM and deny Mr. Saufley's comments.

### **Discussion**

The Commission will grant a rule making petition proposing a change in the FM Table of Allotments when the petition serves the public interest. In determining whether a rule making petition serves the public interest, the Commission compares the present arrangement of FM Allotments with those proposed in the rule making petition. If the proposed arrangement of allotments satisfies a higher priority under the *FM Priorities*, the Commission will grant the petition.

The Force 5 petition serves the public interest. The present arrangement of allotments satisfies priority four, other public interest matters. Presently, no local service is proposed for either the communities of Marlinton or Keswick, and certain areas would not receive either a first or second local service. The Force 5 petition proposes an arrangement of allotments that satisfies priorities one, two and three, because the petition proposes first and second aural services, as well as first local service to the communities of Marlinton and Keswick. When the

present arrangement of allotments is compared with the proposed arrangement of allotments specified in the Force 3 petition, it is readily apparent that the Force 3 petition represents a preferential arrangement of allotments under the *FM Priorities*. Consequently, the Force 5 petition serves the public interest.

Mr. Saufley's interest in the present format of music on WBOP(FM) although appreciated, has no legal significance in any determination to amend the FM Table of Allotments. The Commission does not regulate entertainment formats.<sup>4</sup> The Commission neither defines nor enforces the "public interest" in the commencement or discontinuance of radio entertainment formats, instead relying upon the marketplace as the best way to allocate entertainment formats.<sup>5</sup> The Commission recognizes that any scheme regulating such formats would be "counterproductive in terms of maximizing the welfare of the radio listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation in radio programming."<sup>6</sup> In light of the Commission's pronounced and long-standing policy not to regulate entertainment formats, Mr. Saufley's interest in the present format broadcast on WBOP(FM) is irrelevant in determining whether the proposed change in community of license for WBOP(FM) serves the public interest.

### **Conclusion**

The NPRM proposes a preferential arrangement of the FM Allotments that will result in the creation of two first local services as well as first, second, third and fourth aural services. Mr. Saufley's comments do not rebut the public interest benefits of the NPRM, and does not state any public interest benefits in retention of the present arrangement of FM Allotments.

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<sup>4</sup> See, e.g., *GAF Corporation*, 7 FCC Rcd 3225, 3226 (1992)

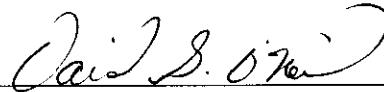
<sup>5</sup> See *Id.*

<sup>6</sup> See *Id.*

**WHEREFORE**, in light of the foregoing, Force 5 Communications, LLC respectfully requests that the Commission issue an Order in the instant proceeding and modify Section 73.202(b) of the Commission's Rules to allocate Channel 292A to Marlinton, West Virginia and reallocate Channel 292B1 from Churchville, Virginia to Keswick, Virginia as that community's first local service, substitute Channel 291A, and modify the community of license for WBOP(FM) to operate on Channel 291A at Keswick

Respectfully submitted,

**FORCE 5 COMMUNICATIONS, LLC**

A handwritten signature in cursive script, appearing to read "David G. O'Neil", is written over a horizontal line.

David G. O'Neil, Esq.  
Rini Coran, PC  
1615 L Street, NW  
Suite 1325  
Washington, DC 20036  
(202) 955-3931

December 21, 2005

Its Counsel

## **EXHIBIT 1**

Al P. Saufley  
6151 Scotts Ford Road  
Mt. Crawford, VA 22841

November 13, 2005

Federal Communications Commission  
Office of the Secretary  
445 Twelfth Street SW, TW-A325  
Washington, D.C. 20554

To Whom It May Concern:

I recently read in the local newspaper that the parent company of WBOP, Churchville, was requesting to re-license it to another location and to allot it's current frequency to still another location.

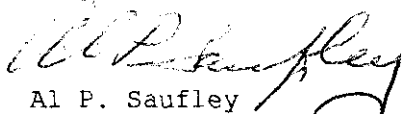
I guess I do not really understand the intricacies of this request nor am I against a company trying to maximize the return on it's investment, but, I object to losing the oldies music now available on "Magic 106.3" We previously lost this format when "Oldies 93.1" (WBHB) abruptly changed to a different format months ago. People I have talked to, and myself, were very delighted when WBOP made oldies music available to our area again.

Please carefully consider this request before approving any changes that would deprive our area of this much enjoyed musical era.

Also, judging from the advertisers and call-in responses etc., it would appear that WBOP is very popular all around and presumably should be a viable business.

I thank you in advance for your careful consideration!

Very truly yours,

  
Al P. Saufley

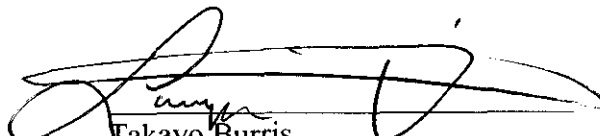
Copy to:  
David G. O'Neil, Esq.  
Rini Coran, PC  
1501 M Street. N. W.  
Suite 1150  
Washington, D.C. 20005

**CERTIFICATE OF SERVICE**

I, Takayo Burris, hereby certify that a true and correct copy of the foregoing  
“Reply Comments of Force 5 Communications, LLC” was sent via first class mail,  
postage prepaid this 21<sup>st</sup> day of December 2005 to the following:

Barthen R. Gorman\*  
Federal Communications Commission  
Media Bureau  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Mr. Al P. Saufley  
6151 Scotts Ford Road  
Mt. Crawford, VA 22841

  
Takayo Burris

\*Via Hand Delivery